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88-391

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES J. KRAJEWSKI, Individually and in his Capacity as Judge of the Lake County Court, Division III

Petitioner,

v.

STEVEN A. KUROWSKI and DAVID H. NICHOLLS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Court of Appeals should be reviewed in order to decide what renders party affiliation an appropriate requirement for the effective performance of a public office, an important question of federal constitutional law that has not been but should be decided by this Court to resolve a conflict among the Circuits and which issue is left unanswered in this Court's prior decisions pertaining to political patronage; and, in the alternative, whether this Court should review its earlier cases on political affiliation and overrule them.

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JAMES J. KRAJEWSKI, Individually and
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STEVEN A. KUROWSKI and DAVID H. NICHOLLS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND APPENDIX

Petitioner James J. Krajewski, Individually and as Judge of the Lake County Court, Division III, respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (hereafter Seventh Circuit) entered in cause numbers 87-2675 and 87-3016 on June 2, 1988, which affirmed the judgment against him rendered in the United States District Court for the Northern District of Indiana, Hammond Division (hereafter District Court), the Honorable Andrew P. Rodovich, United States Magistrate, presiding by consent of all parties and upon reference from the United States District Judge.

Respondents are Steven A. Kurowski and David H. Nicholls, plaintiffs in the District Court and appellees in the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit issued on June 2, 1988, is reported at 848 F.2d 767 (7th Cir. 1988), and is found in the Appendix to this petition starting at page A-1. The decision of the District Court, entered orally from the bench at the conclusion of the trial, is unreported and is found in the Appendix starting at page A-22. Prior to trial, the District Court denied a motion to dismiss submitted by petitioner; and, also granted a motion for partial summary judgment while denying a cross-motion for summary judgment, on the issue of whether the respondents were in positions as to which political affiliation is a legitimate criterion. Those decisions are unreported and are found in the Appendix at pages A-25 and A-35.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 and Rule 17 of the Rules of this Court.

The decision of the Seventh Circuit was entered on June 2, 1988. This petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101 and Rule 20.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides as follows:

> All persons born or naturalized in the United States, and all subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

> state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case

This case arises from an affirmance by the Seventh Circuit of a judgment entered for the respondents and against the petitioner following a trial to the Court, the United States Magistrate presiding over said trial by consent of the parties. The trial occurred after motions to dismiss and for summary judgment were denied by the District Court.

The action in the Courts below was a "civil rights" action authorized under 42 U.S.C. § 1983, alleging that the respondents were discharged from their positions as part-time pauper counsel for improper, political reasons.

B. Course of Proceedings Below

A complaint was filed by respondent Steven A. Kurowski on August 8, 1986. Petitioner Krajewski moved to dismiss that complaint on October 27, 1986. Prior to the motion to dismiss reaching the District Court, an amended complaint was filed by

Kurowski, adding respondent David Nicholls as a named party. On November 26, 1986, the petitioner Krajewski moved to dismiss the amended complaint. All parties consented to trial and decision by the United States Magistrate, and the case was referred to him for trial and decision by order dated December 1, 1986.

The petitioner Krajewski's motion to dismiss was overruled on January 28, 1987. An answer was filed by Krajewski.

On April 15, 1987 and on September 9, 1987, the District Court granted motions to dismiss filed by the Lake County Commissioners and the Lake County Council, originally named as co-defendants.

Petitioner moved for summary judgment in his favor. Respondents replied to that motion, urging that it be denied and that summary judgment on part of the issues be entered in their favor. The Court denied the petitioner's motion for summary judgment and granted partial summary judgment to the respondents on September 22, 1987, concluding that the positions that they had occupied were not positions for which political affiliation was a legitimate consideration.

Trial was held to the Court on October 1, 1987. At the close of respondents' case petitioner (by the time of trial the only defendant in the action) moved to dismiss for failure of the respondents to prove their case. This motion was denied by the Court.

Following the presentation of evidence, judgment was entered for respondents, awarding compensation for lost wages and benefits, emotional distress, punitive damages, and ordering reinstatement to the former positions. In the judgment, respondents were awarded their attorney fees and the Court awarded respondents their entire request.

C. Statement of the Facts

Judge James J. Krajewski was first appointed to the bench by the Supreme Court of Indiana when Orval Anderson, the elected judge of the Lake County Court, Division III was

indicted by a federal grand jury for perjury. Approximately four months later, Orval Anderson was convicted and Judge Krajewski became the permanent judge of the Court. In addition, the chief pauper counsel under Orval Anderson was indicted by the federal grand jury and was later convicted of crimes relating to the state court and to his duties with the court.

When Judge Krajewski took over the Court, he became aware of "scams [that] were going on with the public defenders and the court," whereby persons sent to jail could arrange for shock probation (*i.e.*, release to probation by modification of the sentence after an executed sentence had already been given the person) after payment of a fee to attorneys. Tr. 145-46. *Pro Tempore* Judges were one of the problems with the Court under Judge Anderson. Tr. 107. As a result of the indictments and convictions of former Judge Orval Anderson and former chief pauper counsel Lee Christakis, the integrity of the Court was impugned. Tr. 113. Indeed, respondent David Nicholls was one of the people named in the media as a target of the federal grand jury investigations. Tr. 114-15.

Upon his appointment by the Supreme Court of Indiana as the Permanent Judge *Pro Tempore* and also with his appointment by the Governor of Indiana following the conviction of Orval Anderson, Judge Krajewski inherited the entire staff of Orval Anderson, including the two pauper counsel who are the respondents in this action. All pauper counsel in that Court are part-time employees, who are free to and did continue to maintain a private practice of law.

In December of 1985, Judge Krajewski informed respondents (as well as Lloyd Fisher, another pauper counsel in Division III inherited from the now-convicted Orval Anderson) that as of January 1, 1986, their services would no longer be needed. Other than those terminations necessitated by budget cuts, Judge Krajewski terminated the employment of only (1) the respondents and the other pauper counsel who had worked under Judge Anderson, (2) a person whom he did not trust (tr. 95), (3) a bailiff who did not appear for work (tr. 96), (4) a person

whose position was not identified but who could not get along with the Judge (tr. 96), (5) a person whose job was done away with (tr. 96), and (6) one employee who resigned. Tr. 97.

There were no written guidelines with respect to pauper counsel in Division III of the Lake County Court. While there was a "chief" pauper counsel under Judge Anderson, the other pauper counsel "never really had much of a relationship with [him] other than . .. for him to say when I started there . . . 'You come on Tuesday and Thursday and Dave has Monday and Thursday.'" Deposition of Kurowski, page 19. The pauper counsel had no guidance from either the Court or the "chief" pauper counsel other than as to which days they were to be in court for accepting pauper cases. Respondents were not required to follow the most minimal guidance as to the operation of the pauper counsel system in Division III; they even decided their own hours and days. Kurowski Deposition, page 19.

Sitting as the judge *pro tempore* was part of the job of being a pauper counsel in Division III. Deposition of Krajewski, page 22. Respondent Kurowski sat as Judge *Pro Tempore* "maybe once a month" while Judge Anderson was in office. Kurowski Deposition, page 12-13. The practice — the duties of the position as established under the previous administration — continued under Judge Krajewski.

When pauper counsel took their turn as Judge *Pro Tempore*, they acted in accordance with their own philosophy and the statutes and not on directions from petitioner or his predecessor in office. Deposition of Kurowski, pages 15-16; Deposition of Nicholls, pages 8-9. There were no written or other guidelines for respondents when sitting as the judge *pro tempore* of the Court. Deposition of Nicholls, pages 10-11.

REASON FOR ALLOWANCE OF THE WRIT

THE DECISION OF THE COURT OF APPEALS SHOULD BE REVIEWED IN ORDER TO DECIDE AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN BUT SHOULD BE DECIDED BY THIS COURT, LEFT UNANSWERED IN THIS COURT'S DECISIONS PERTAINING TO POLITICAL FIRINGS, AND IN LIGHT OF THE UNIQUE NATURE OF THE EMPLOYMENT AT ISSUE; AND, IN THE ALTERNATIVE THIS COURT SHOULD REVIEW ITS EARLIER CASES ON POLITICAL AFFILIATION AND OVERRULE THEM IF FOUND APPLICABLE TO THE FACTS OF THIS CASE

Plaintiffs rely for their First Amendment claim on *Elrod v. Burns*, 427 U.S. 347 (1976) and *Branti v. Finkel*, 445 U.S. 507 (1980). Those two decisions leave open the issue of how to administer the test set forth and the meanings of the terms used, and the Circuits are in conflict on the proper approach to this issue.

In the eight plus years since *Branti* was decided this Court has not addressed the issue of what constitutes a demonstration that party affiliation is an "appropriate requirement" for the "effective performance" of the job. As Justice Powell, in his dissent in *Branti*, correctly observed, the test established by this Court is phrased in "vague and sweeping language certain to create vast uncertainty." *Branti*, at 524 (Powell, J., dissenting). He further stated that "[a] constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key governmental personnel." *Id.* at 525 (Powell, J. dissenting). This vagueness and uncertainty as to application have resulted in the erroneous decision of the Seventh Circuit in this case. The standard must be clarified, in order that local officials (those most affected by claims of patronage firings) will know, understand, and give effect to their obligations and limitations.

Relying in part on *Illinois State Employees Union v. Lewis*, 473 F.2d 561 (7th Cir. 1972), this Court in *Elrod* held that discharge solely for political reasons of a non-policymaking, non-confidential government employee is a violation of the First Amendment, which Amendment is applicable to the States by reason of the Fourteenth Amendment. This Court in *Branti* moved this analysis toward whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved. Courts have recognized that if a person is in either a policy-making or a confidential position (to the extent that these terms are utilized as short-hand for this Court's formulation in *Branti*), then they may be dismissed even if the reason is that the person is not of the same political affiliation as the employer.

However, the meaning and application of the test sought to be set by this Court are unclear. As the United States Court of Appeals for the Tenth Circuit concluded upon a review of the cases, "[i]n determining whether a position is one where 'party affiliation is an appropriate requirement for the effective performance of the public office involved,' the circuits differ on the appropriate test to employ," citing the differing applications in the Seventh and Eighth Circuits. *Dickeson v. Quarberg*, 844 F.2d 1435, 1441 (10th Cir. 1988) (citation omitted). The Seventh Circuit focuses on the position in the abstract while the Eighth Circuit focuses upon what the person in the particular position actually does. In this case, the Eighth Circuit would have focused upon the duties of pauper counsel as defined by what the pauper counsel did on a day-to-day basis (including their service as substitute judges), while the Seventh Circuit focused on the position of pauper counsel in the abstract, somewhat akin to Plato's Forms.

The Third Circuit has also observed the necessity for clarification of the approach, stating that while this Court has provided a test it has not specified the factors which will make a position fall within the ambit of that test. *Brown v. Trench*, 787 F.2d 167 (3rd Cir. 1986). In support of the observation of the

need for this matter to be settled by this Court, the Third Circuit in *Brown* cited cases from several Circuits and Districts, and one need only to read that listing to see the lack of continuity that exists. *Id.* 787 F.2d at 166-67.

In this case, the Seventh Circuit confronted a situation where part-time pauper counsel, hired directly by and responsible solely to a politically selected judge, and who sit as judges *pro tempore* (described as "a duly licensed attorney who is appointed by the judge to serve for a specified amount of time and assumes all the powers and responsibilities of the judge for that period of time", tr. p. 107) were alleged to have been fired for purely political reasons.

First, this Court has never determined whether there is a distinction to be made between full- and part-time employees. Such a distinction is warranted given the nature of the employment in this case. This is merely extra income to a few people who have private practices of law upon which they rely for the major part of their income and livelihood and they are not the full-time employees this Court considered in *Elrod* and *Branti*. Local government is replete with part-time positions, such as county attorneys in small counties where a full-time position is not warranted (county attorneys being those who, in Indiana, represent and advise county officials and departments on civil matters) and assistant prosecutors in small counties not needing full-time assistants for the prosecutor. Guidance as to this point is needed. Non-renewal of a contract of a part-time employee can result in litigation that can bankrupt a small, rural county.

Further, the formulation by this Court of "effective performance" is not but needs to be developed by this Court, as observed in the dissenting opinion in *Branti*. In the most general terms, there is nothing that can be done effectively by a member of only one political party as opposed to another. *See Garretto v. Cooperman*, 510 F.Supp. 816, 819 (S.D.N.Y. 1981). However, States have determined in some cases that judges and other officials shall be elected or otherwise selected on the basis of partisan politics. Such is the case with the Lake County

Court, Division III. It could have been but was not decided in Indiana that judges would all be elected on a non-partisan basis. However, candidates for many judgeships in Indiana and elsewhere run for election as a member of a political party. The Constitution does not impact upon such determinations.

Given the fact that the part-time pauper counsel sit as substitutes for the regular judge when he is not available but the work of the Court must continue, the Seventh Circuit failed to follow the dictates of this Court — due to the lack of clarification that should now be given — as to the standard for "effective performance" of the job and also as to what constitutes the position, the point on which the Seventh and Eighth Circuits conflict. While a judge may be of either major party the citizens of Indiana have the virtually unquestioned right (which they have exercised) to determine that their judges will be elected in a partisan manner. The Seventh Circuit has ignored the elected representatives of the State of Indiana in holding that those whose jobs include serving as substitute judges (with all the powers and responsibilities of the regular judge) cannot be selected on the same basis as the judge himself. This needs to be clarified in general, and corrected in this case by reviewing and reversing the decision of the Seventh Circuit that partisanship is not a proper consideration for those who serve a substitute judges.

The primary aspect of this case that is unique is that the pauper counsel sat as judges *pro tempore*, an additional duty imposed for the convenience of the regular judge and for the effective operation of the Court.

While any attorney may serve as a judge *pro tempore* in Indiana, it is much more convenient and less intrusive on the time of the local bar to ask those who are receiving pay from the Court to perform this task, for which there is not additional compensation paid. While the Seventh Circuit recognized this fact, it rejected it as a reason for distinguishing part-time pauper counsel as that position is constituted in this case from full-time public defenders operating under the direction of another public defender. The Seventh Circuit held that since

any attorney can serve as a judge *pro tempore* without regard to political affiliation under the applicable Indiana Rules of Trial Procedure, then those who are in a job the duties of which include serving as judge *pro tempore* cannot be selected on the basis of partisan politics. If the citizens of the State of Indiana wish to choose judges on the basis of politics (and, by implication, also designate who shall serve as substitute judges), the federal courts cannot so lightly reject that determination. The next logical step is to hold the citizens of Indiana liable for failing to re-elect a judge whose political party affiliation the voters have determined to reject.

The Seventh Circuit should have followed the lead of the Eighth Circuit in reviewing not what it believes the position should entail but what those in the position actually did, giving full bent to the way that the state or county has defined the position. The federal courts should not be in the business or position of telling the states what positions to have or how those positions are to be defined and to function. The settling of this matter by this Court is therefore needed.

If the Seventh Circuit had not acted in conflict with the approach of the Eighth Circuit, the decision would have been in favor of petitioner. In the capacity of substitute judges (which is the way that the position *is* instead of the way that the Seventh Circuit felt that the position *should be*), pauper counsel are in a "policy-making" position in the Lake County Court, Division III. The policy that is made is not merely binding upon the Judge; it is much more than that. The policy made from the bench by judges *pro tempore* is the policy of the court for that case and for that period of time. It is an integral part of the functioning of the court, unlike a mere clerical assistant following directives and making no decisions impacting upon the operation of the court, and unlike the probation officer or hearing officer whose decisions are mere recommendations that have no effect until and unless accepted and ratified by the judge.

That the respondents were in policy-making positions (again, as the position is and not as the Seventh Circuit felt that

it ought to be) is further shown in their relationship with the Court and with other court employees. Yet, the Seventh Circuit, lacking guidance from this Court, failed to acknowledge that fact, looking instead to the position as the Seventh Circuit felt it appropriately constituted. There are no written guidelines from the employer Judge with respect to pauper counsel in Lake County Court. The pauper counsel were free to formulate their own policies and to handle cases in the manner in which they saw fit. They did not have a supervisor or head pauper counsel in any fashion more than in name, a person whose position meant only a higher salary (before a reorganization in 1986 resulting in all pauper counsel being paid the same salary) and not that the chief pauper counsel directed the efforts of others. In this regard, they are more in the position of the employer Public Defender in *Branti v. Finkel* than in the position of the two assistants in that case. *Branti* recognizes that policy makers can be dismissed from employment, but found that the two assistants in that case were not policymakers. This Court did not find and cannot be argued to have determined that no public defender can ever be in a policymaking position. Indeed, this Court "[expressed] no opinion as to whether the *deputy* of such an official could be dismissed on grounds of political party affiliation or loyalty," *Branti* at 519 n. 13 (emphasis added), implying that the employer himself can be selected on the sole basis of politics. Since pauper counsel in this case are in at least the position of a deputy, determining conditions of employment and structuring within very broad guidelines the nature of their own employment, this is an opportunity to decide that open issue.

This Court observed in the plurality opinion in *Branti* that it is "not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered." *Branti* at 518. It is apparent that the Circuits and the District Courts need clarification of that question, more detailed guidelines to guide them in this determination. Despite the lack of clarity in the decisions of this Court and the conflict with other Circuits, the District Court and the Seventh Circuit rejected qualified immunity in this case because, appar-

ently, they thought *Elrod* and *Branti* "clear". These cases are not clear at all on this point.

This Court observed that the two assistant public defenders in *Branti* were not in policy-making positions because they "did not make decisions about the orientation and operation of the office in which they work." *Branti*, at 511. This Court did not say that assistant public defenders never make decisions about the office, or that they should not. Contrary to the situation in *Branti* the respondents in this case did make decisions about the orientation of their positions and about the way that they operated in their office. While there was a "chief" pauper counsel the other pauper counsel "never really had much of a relationship with [him]." Deposition of Kurowski, page 19. The respondents had no guidance from either the Court or the "chief" pauper counsel other than on what days they were to be in court for accepting pauper cases. Thus, unlike the two assistant public defenders in *Branti*, respondents were in fact deciding the "operation of the office." As to orientation, they were left entirely on their own. No one told them what to do, what plea agreements to make, what motions to file, what positions to advocate or to abandon. This elevated them to policy-making employees, whose employment was terminable for any reason, including but not limited to political affiliation. The Seventh Circuit did not have sufficient guidance from this Court as to what constitutes the effective performance of the task of pauper counsel as it exists in petitioner's court, and this Court should provide that guidance by granting certiorari and reviewing (and ultimately reversing) the decision in this case.

While petitioner could theoretically set guidelines for his pauper counsel and thereby render them non-policy-making employees, that has never before been required of an employer and would not be wise in this case. Again, the federal courts should not tell states and counties the duties of their employees or employers in this context. In *Branti*, as in the numerous similar situations, the employer is another person in a position similar to the employee. The employer in *Branti* was a public defender and the employees were his assistant public defen-

ders. Unlike that situation, respondents were pauper counsel and the employer is the judge in front of whom they act. It is unwise for a judge to direct how his pauper counsel are to perform, lest the claim be made that the court is interfering with the delivery of legal services before it, thereby undermining the integrity of the pauper counsel system. Respondents were free and should be left free to determine the "orientation and operation of the office in which they work." This is not a system — unlike *Branti* — in which the employer can oversee the work of the pauper counsel. The Court of which the petitioner is the Judge could have a chief public defender in fact as it had in name; but, again, there is no basis or precedent for the federal courts to order a restructuring of the system. Respondents and the Courts must take the system as it is, and cannot request or order a different system in order to take away the fact that the respondents were indeed making policy decisions. This Court is faced with a situation where the pauper counsel are and must be free to determine how they will operate and the orientation that will guide them. Petitioner does not and cannot continually oversee the operation of the public defender system in his Court, and the federal courts cannot decide that some other method of operation and organization is more appropriate than the one that is in place.

Because the standard that this Court established in *Branti* is vague, sweeping, and uncertain, clarification is needed and therefore certiorari should be granted in this case to provide that clarification, to decide an issue that has not been but should be settled by this Court, and to resolve the conflict existing between the Seventh and Eighth Circuits as to the proper approach to decisions.

In the alternative, and should this Court determine that the standard will not or cannot be further clarified, the decisions in *Elrod* and *Branti* should be reviewed and overruled, as being in conflict with more than 200 years of history. The history of the United States in the time since 1976 when *Elrod* was decided does not demonstrate that the effectiveness of government has been enhanced as a result of that decision. On the contrary,

employers are burdened with unwanted employees, and the citizens suffer due to a lack of a smoothly functioning government, due to lack of advancement of policies resulting from conflicts between employers and employees in jobs the very nature of which puts them at the core of partisanism, and due to loss of the time and resources taken to battle allegations of improper, political terminations of employment, decreasing the time available for the elected officials to devote to the business of governing efficiently and carrying out the policies on the basis of which they were put into office.

To resolve these matters, this Court should issue a writ of certiorari to review the decision of the Seventh Circuit in this case, and ultimately to reverse that decision after clarification of the issues that have not been but should be decided by this Court. In the alternative, this Court should overrule its decisions in *Elrod* and *Branti*.

CONCLUSION

For the foregoing reasons, it is respectfully urged that certiorari be granted to review the decision of the United States Court of Appeals for the Seventh Circuit, and to reverse that decision.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 87-2675 and 87-3016

STEVEN A. KUROWSKI and DAVID H. NICHOLLS,

Plaintiffs-Appellees,

v.

JAMES J. KRAJEWSKI, individually and in his capacity as Judge of the Lake County Court, Division III,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 86-C-586—**Andrew P. Rodovich,** *Magistrate.*

ARGUED APRIL 14, 1988—DECIDED JUNE 2, 1988

Before WOOD JR., COFFEY, and EASTERBROOK, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* After judge Orval Anderson of the Lake County Court was indicted, the Supreme Court of Indiana appointed James J. Krajewski in February 1985 to fill the position temporarily. Under Indiana law, Krajewski had the authority to appoint any necessary public defenders. The chief public defender had been indicted, but Krajewski asked Steven A. Kurowski and David H. Nicholls, the assistant public defenders, to stay on. Judge Anderson resigned in June 1985 following his conviction, see *United States v. Anderson,* 798 F.2d 919

(7th Cir. 1986), and the Governor of Indiana gave Krajewski the regular appointment. Krajewski praised the work of Kurowski and Nicholls to date and increased their salaries.

Six months later he fired them. Kurowski and Nicholls, like the judge who hired them, are Democrats. Nicholls is a member of the Central Committee of Lake County's Democratic Party; Kurowski is a Vice-Committeeman of his precinct. They campaigned for Judge Anderson's retention in 1976, 1980, and 1984; Kurowski represented him in the criminal prosecution. Krajewski, like the Governor who appointed him, is a Republican. Although Krajewski appointed as chief public defender a friend who generally votes Democratic (but is not active in politics), he filled the assistants' jobs with Republicans. The assistants responded with this suit under 42 U.S.C. §1983, contending that the use of political criteria in selecting public defenders violates the first amendment, applied to the states through the fourteenth.

The parties consented to final disposition by a magistrate, 28 U.S.C. §636(c). The magistrate granted partial summary judgment to the plaintiffs on issues concerning official immunity and held a trial on the question whether Judge Krajewski fired the plaintiffs because of their politics. He concluded that Krajewski had done this and awarded compensatory damages aggregating $59,075 and punitive damages of $1,000 per plaintiff; he also ordered the plaintiffs reinstated as assistant public defenders. On motion of the plaintiffs, the magistrate awarded $13,905 as attorneys' fees under 42 U.S.C. §1988. Krajewski's appeal contests every aspect of the decision except the award of punitive damages, which he apparently concedes are appropriate if he is liable at all.

I

Public defenders represent criminal defendants, and their loyalty as advocates runs to their clients, not to their employer. Although paid by the state, in their role as

counsel they are not even "state actors". *Polk County v. Dodson*, 454 U.S. 312 (1981). The Supreme Court said in *Branti v. Finkel*, 445 U.S. 507 (1980), that political beliefs and affiliations are not permissible criteria for firing public defenders, precisely because a public defender is the advocate of the accused rather than a maker or implementer of political decisions. *Branti* held that a chief public defender may not fire assistant public defenders on political grounds. Krajewski argues that things are different when a judge fires an assistant public defender, but this misunderstands *Branti*. The Court's decision turned on the characteristics of the assistant public defender's job, not on the office of the person doing the firing.

Branti dealt with public defenders in New York. Krajewski tells us that public defenders in Indiana are different. Indiana Trial Rule 63(E) permits a trial judge to appoint a "judge *pro tempore*" to serve while he is away. The judge *pro tempore* exercises the full powers of the office, conducting trials, sentencing defendants, and so on. See *Survance v. State*, 465 N.E.2d 1076 (Ind. 1984). Krajewski's predecessor frequently appointed public defenders to sit as judges *pro tempore* in his absence. Krajewski continued this practice with respect to Kurowski, although there is no evidence that he appointed Nicholls to sit as judge *pro tempore*.

Judge Krajewski maintains that the duties of the office of public defender in Indiana therefore include functions in addition to those considered in *Branti*, and that because the judge *pro tempore* is a policy-maker for the State of Indiana, political criteria may be applied to the job of public defender. The magistrate disagreed on the ground that judges *pro tempore* are not the instruments of the judge who appoints them; because judges *pro tempore* are free agents, the magistrate thought, and do not carry out the regular judge's policy, it is inappropriate for the regular judge to employ political criteria in selecting a judge *pro tempore*.

The magistrate's approach is unsatisfactory because it assumes that *Branti* and its progenitor, *Elrod v. Burns*,

427 U.S. 347 (1976), permit an appointing officer to consider the appointee's political views only when the appointee carries out the appointing official's own "policy". If this is so then, for example, the governor could not consider a would-be judge's politics when deciding whom to appoint (because the judge is independent of the governor once in office), and the President could not consider the views of a prospective appointee to the Federal Trade Commission when making that selection. Neither *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies.

A governmental officer holding the power of appointment may make any decision he pleases, unless the Constitution bars the way. The pertinent provision—the guarantee of free speech contained in the first amendment—disables the government from firing a person based on his speech and political beliefs (and thus penalizing the employee for holding or advocating those beliefs) unless the beliefs are relevant to the job in question. They will be relevant, the Court said in *Branti* and *Elrod*, when the office involves making on the state's behalf the sort of decisions about which there are political debates. That is to say, the first amendment does not remove political beliefs from politics; it would undermine the democratic process to hold that the winners at the polls may not employ those committed to implementing their political agenda.

So the right question is whether there may be genuine debate about how best to carry out the duties of the office in question, and a corresponding need for an employee committed to the objectives of the reigning faction. *Shondel v. McDermott*, 775 F.2d 859, 864 (7th Cir. 1985); *Lindahl v. Bartolomei*, 618 F. Supp. 981, 987-88 (N.D. Ind. 1985). When the officeholder wields the final authority of the government, the answer to that question almost always will be yes. It will frequently be yes even lower within the bureaucracy. See, e.g., *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985), holding that the

number two person in a bureaucracy devoted to delivering water could be fired on political grounds, because the operation of municipal enterprises is embroiled in politics—because there may be genuine debate both about how to allocate resources between waterworks and snow removal, and about how best to deliver water—the "ins" need the loyalty of the senior managers in order to implement their programs.

A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions. The Governor of Indiana was entitled to consider Krajewski's views about the role of judges—or even simply Krajewski's political affiliation—when making the appointment, just as the voters may consider these factors without violating the first amendment when deciding whether to retain Judge Krajewski in office. (We put aside all debate about whether recourse to politics in selecting judges is good or bad; we are concerned only with the constraints the first amendment imposes on the way the State of Indiana prefers to organize its government.) What is true about the office of judge is true about the office of judge *pro tempore*. It is the same job; only the tenure of the officeholder differs. The regular judge holds office for four years; the judge *pro tempore* holds office at the pleasure of the regular judge. Since the disposition under *Elrod* and *Branti* depends on the duties of the office rather than the tenure of the incumbent, it follows that political beliefs may be the basis for the appointment of a judge *pro tempore*. If Judge Krajewski wants a judge *pro tempore* committed to "law and order" or to sympathy for criminal defendants, the first amendment is no obstacle.

Accordingly, we must decide whether the plaintiffs' job included duties as judge *pro tempore*, for if it did then

Judge Krajewski may apply political criteria. And we must ask what the powers of the actual office were, not what an "ideal" public defender does. *Tomczak*, 765 F.2d at 640. Because the magistrate granted partial summary judgment for Kurowski and Nicholls on the question whether Judge Krajewski could take their politics into account, any disputed question of material fact requires a remand for retrial.

There is no material dispute, however. Indiana Trial Rule 63 makes it pellucid that judicial service is not part of a public defender's duties in Indiana—one can be a public defender but not a judge *pro tempore*, or a judge *pro tempore* but not a public defender. The only qualification is that the judge *pro tempore* "shall be an attorney in good standing at the bar of the Supreme Court of this state." Rule 63(C). Krajewski concedes that he has appointed as judge *pro tempore* attorneys who are not public defenders. After he fired Kurowski and Nicholls, he asked them to sit in for him while he was on vacation the next month, the most vivid demonstration that public defender and judge *pro tempore* are not the same job. More, Nicholls testified without contradiction that he could not recall serving as judge *pro tempore* after Judge Krajewski's appointment in February 1985, although he was an assistant public defender for another eleven months. Judge Krajewski may have turned frequently to the attorneys closest to hand, the public defenders. This does not make judicial service part of the public defender's office, any more than it would make such service part of the job of a lawyer in private practice who happened to be a confidant of the judge. We doubt that the Attorney General of Indiana—who represents Judge Krajewski in this court—would argue that Democrats may be excluded from the Bar of Indiana because judges may choose to appoint only Republicans as judge *pro tempore*. There is no greater reason why a political test may be imposed for the job of assistant public defender.

II

After hearing the evidence at trial, the magistrate had to choose between competing stories. The plaintiffs insisted that Krajewski fired them to make room for Republicans, in order to maintain the support of the Republican Party in his campaign for retention in office. Judge Krajewski insisted that he fired Kurowski and Nicholls because they had been hired by his convicted predecessor and had worked closely with Lee J. Christakis, the convicted former chief public defender. Since Kurowski and Nicholls had the taint of their associations about them, Krajewski maintained, he removed them in order to improve the public standing of the court. Whether Kurowski and Nicholls were saints or sinners, Judge Krajewski contended, the court as a whole was better off without them. Since a public official may fire subordinates for a good, bad, or indifferent reason—any but an unconstitutional reason—the actual moral standards of Kurowski and Nicholls are irrelevant. It was enough that he had lost confidence in them. See *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983).

This presented the magistrate with the need to decide who to believe. If Judge Krajewski in fact thought Kurnowski and Nicholls a blot on the court's escutcheon, he could fire them, whether they were or not. If Krajewski just thought Kurowski and Nicholls two obstacles to patronage for the Republican Party, he could not fire them. The magistrate took the latter view. That finding is not clearly erroneous. See *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

Judge Krajewski's conduct undercuts his contention that he came to office with a broom and swept out the clutter he encountered. He retained Kurowski and Nicholls for eleven months and never inquired of the prosecutor or any other source whether there were grounds to suspect the two of misconduct. When Krajewski was given the permanent appointment in June 1985, he told Kurowski and Nicholls they had done good work so far, and he

raised their salaries. He warned them at the same time that as a Republican appointee he was under pressure for their jobs, and that they must understand "how the game is played". Judge Krajewski testified at trial that he was indeed under such pressure. When he told the plaintiffs in December that they would be replaced effective January 1, 1986, Krajewski repeated the comment that he was under pressure from the Republican Party. He gave Kurowski and Nicholls no other reason for their discharge and allowed that he could probably be sued for what he was doing. He then asked whether either would be willing to serve as judge *pro tempore* the next month. This is not the path trod by one intent on turning out rascals.

III

A. Krajewski contends that as a judge he is immune from liability in damages for actions taken in a judicial capacity. Although the parties do not discuss our jurisdiction to consider this question, we must consider the subject anyway. Judge Krajewski moved before trial for summary judgment on the grounds of absolute and qualified immunity. The magistrate denied Krajewski's motion and granted partial summary judgment to plaintiffs on the issue. This decision was immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Scott v. Lacy*, 811 F.2d 1153 (7th Cir. 1987). Krajewski did not appeal; instead he persevered and presented the immunity question as a ground for reversal after losing on the merits. At least one court of appeals has held that a public official must appeal as soon as *Mitchell* permits, and if he waits he is barred from raising the question later—at least on a subsequent interlocutory appeal. *Kennedy v. City of Cleveland*, 797 F.2d 297, 304-05 (6th Cir. 1986). No court has addressed the question whether the rationale of *Kennedy*, by extension, forbids raising the question on appeal from a final judgment.

Mitchell allows an immediate appeal on the theory that the rejection of a claim of absolute immunity is a "col-

lateral order" disposing of rights separate from the merits, rights lost if appeal does not come until after trial. See *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S. Ct. 1133, 1136-38 (1988). Absolute immunity establishes both a right not to pay damages and a "right not to be tried"—that is, it grants freedom from the emotional travail, commitment of time, and legal expense involved in going to trial. Immunity doctrines lose some of their force if these benefits are withheld until after trial. Trial is not "irreparable injury", see *PaineWebber Inc. v. Farnam*, No. 88-1169 (7th Cir. Apr. 11, 1988), slip op. 2-3 (collecting authority), but it may so defeat the purpose of this privilege that an immediate appeal is an essential ingredient of the right itself. See also *Abney v. United States*, 431 U.S. 651 (1977). The right to appeal forthwith may be combined with the principle that a final judgment must be appealed at once or not at all, e.g., *Exchange National Bank v. Daniels*, 763 F.2d 286, 291-92 (7th Cir. 1985), to produce the conclusion that a public official who foregoes an appeal under *Mitchell* forfeits arguments based on immunity.

This neat little argument encounters a fundamental problem: only final judgments need be appealed. Until a judgment is rendered "final" by entry of a separate document under FED. R. CIV. P. 58, no one need appeal. *United States v. Indrelunas*, 411 U.S. 216 (1973). An appeal from an interlocutory order is not one from a final judgment, even if by virtue of *Cohen* it is from a final decision. Interlocutory orders therefore may be stored up and raised at the end of the case, see *Daniels*, 763 F.2d at 290; *In re Kilgus*, 811 F.2d 1112, 1116-17 (7th Cir. 1987). Other interlocutory decisions, even those producing interlocutory "judgments" (such as the denial of a preliminary injunction) receive the same treatment. See *United States v. Clark*, 445 U.S. 23, 25-26 n.2 (1980). This makes sense. The privilege to take an interlocutory appeal exists for the appellant's protection. Such appeals come at great cost to the judicial system because they may prolong liti-

gation and require appellate courts to cope with each case more than once. Most interlocutory appeals end in affirmance (thus entail wasted motion), because district judges dispose correctly of the vast majority of motions. If the aggrieved party is content to swallow his losses and proceed with the case—if, for example, Judge Krajewski was content to surrender any "right not to be tried" he may have possessed, so long as he did not have to pay damages at the end—no interest of either the judicial system or the adverse party is served by treating the whole subject as forfeit. That would simply induce public officials to file more interlocutory appeals. We therefore hold that a public official may raise questions of immunity on appeal from a final judgment, even though he bypassed an opportunity to take an interlocutory appeal.

B. Before the magistrate, and in his opening brief here, Krajewski relied principally on *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), which held that a judge is entitled to absolute immunity when hiring and firing probation officers. Shortly after Krajewski filed his opening brief, the Supreme Court reversed that decision, *Forrester v. White*, 108 S. Ct. 538 (1988), holding that judges act in an "administrative capacity" when hiring and firing staff—even staff intimately connected with the judicial office—and therefore possess only the qualified immunity that applies to other public officials so acting.

One would think that *Forrester* disposes of any claim of absolute immunity. Krajewski stubbornly clings to it, however, saying in his reply brief that

> [w]hile [*Forrester*] does indeed hold that a judge is not absolutely immune for terminating the employment of a probation officer, that does not answer the question of whether that judge is immune as to the decisions to hire and fire public defenders. That case should be limited to its facts and to cases where the person whose job is in question can only function through advice to the judge.

Litigants should take adverse decisions more gracefully. *Forrester* concludes that absolute immunity does not protect the judge, *even when* the employee in question "can only function through advice to the judge." It would make no sense to hold the judge liable in a case such as *Forrester* but to excuse the judge in a case where the employee is farther removed from judicial duties. *Forrester* holds that the extent of immunity depends on the capacity in which the judge acts; judicial decisions are immune absolutely, while administrative decisions must be evaluated under principles of qualified immunity. Judge Krajewski played an administrative role when firing Kurowski and Nicholls.

C. Qualified immunity is the next question. Krajewski contends that he could not reasonably have been expected to know when he fired Kurowski and Nicholls that his conduct was unconstitutional. Since *Branti* was decided in 1980, five years before Krajewski fired them, this is not a powerful submission. To the extent it has any substance, it rests on the proposition, which we have already rejected, that judges have greater freedom to fire assistant public defenders than do chief public defenders (the defendant in *Branti*). The proposition is no more persuasive now than it was a few pages ago.

True, *Branti* did not involve a judge as a defendant, but earlier cases need not be identical to the one at hand. The question is whether "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right." *Anderson v. Creighton*, 107 S. Ct. 3034, 3039 (1987). *Branti* gave substance to the generalities of the first amendment. A reasonable person in Judge Krajewski's position would have understood in December 1985 that the Constitution forbids firing an assistant public defender on the basis of politics. The magistrate concluded that Krajewski actually did so understand—which is why the magistrate awarded punitive damages.

D. Krajewski was gambling that absolute immunity would protect him from the consequences of a clear constitutional wrong. The bet did not pay off. The Supreme Court's reversal of our opinion in *Forrester* is, however, the basis of a last gasp. Krajewski contends that even if *Branti* clearly established the constitutional right in question, a judge acting in December 1985 could not reasonably have predicted that he would be held liable for such an act. Since principles of immunity have been clarified so recently, the argument concludes, Krajewski is entitled to avoid liability.

This is equivalent to the argument that *Forrester* should not be applied retroactively, despite the presumption that a court applies the law in force at the time of its decision. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). It is an application of the positivism of Judge Holmes, of his view that "law" is nothing more than a prediction of what judges will do. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 460-61 (1897), reprinted in **Collected Legal Papers** 173 (1920). The argument runs: In December 1985 a reasonable person might have predicted that a judge would be immune from damages for firing a public defender; therefore "the law" in 1985 had not clearly established that judges could not fire public defenders; that law has changed, but officials are not obliged to anticipate changes in the law.

A case such as this illustrates that there may be "law" without a judicial remedy. Holmes's law-as-prediction approach focuses on what judges do and is useful for that limited purpose. Holmes had a "bad man" theory of the law and wanted to be able to tell that "bad man" the potential penalties, for these penalties determine the degree of compliance. The Constitution creates rules that apply to all governmental actors, however, no matter what judges will do to implement them. In some cases no one will have standing to sue. *United States v. Richardson*, 418 U.S. 166 (1984). There is nonetheless a rule of law, which all parts of the government must observe. The Guarantee Clause did not lose its meaning when the Su-

preme Court declared controversies under it non-justiciable, see *Luther v. Borden*, 48 U.S. (7 How.) 43 (1849). The decision meant only that the rules would be enforced by officials other than judges. Cf. Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988). Every public actor must conform to the governing rule, no matter how slight the penalty for disobedience. Rules without judicial sanctions are rules just the same. The legislature could impeach and remove Judge Krajewski from office for violating the Constitution, or the Supreme Court of Indiana impose intra-branch discipline, whether or not federal judges are prepared to extract damages.

The principle that law may exist independently of the anticipated sanction has more general application. Changes in the probability of suit and the availability of defenses will affect the sanction but do not necessarily change "the law". A would-be robber might think to himself that the expected penalty for theft is slight, because the local prosecutor has been focusing on drugs. If a new prosecutor cracks down on street crime, so that the expected penalty (the sentence on conviction times the probability of successful prosecution) rises dramatically after the crime has been committed, the robber had no legitimate beef. He has simply lost a gamble. Cf. *Prater v. United States Parole Commission*, 802 F.2d 948, 953 (7th Cir. 1986) (en banc), remarking that even "[s]ettled expectations regarding the vigor of enforcement are unreasonable"—not because factually unsupported, but because the social costs of recognizing them as legitimate would be too high. If the legislature increases the length of the statute of limitations after tortious acts have been committed, the tortfeasor has no legitimate complaint. *Chase Securities Corp. v. Donaldson*, 325 U.S. 304 (1945). Consider too what must be a frequent occurrence: a court of appeals says that ***A***, ***B***, and ***C*** are the elements of bank robbery (or some other crime), and a year later the Supreme Court reverses, concluding that ***A*** and ***B*** are sufficient in themselves. During the interim, was it "the law"

that someone who did ***A*** and ***B*** had robbed a bank? Perhaps not in the sense that the appellate court would penalize the conduct immediately; certainly yes in the sense that the acts met the statutory definition of a crime, and a penalty ultimately might be imposed.

So here. If Judge Krajewski thought that judicial immunity would allow him to get away with a violation of the Constitution, this expectation—factually reasonable though it may have been—is not one the judicial system is prepared to recognize as legitimate. Gamblers must be prepared to pay up if they lose; the gamble is not itself a source of immunity. *Branti* sets the standards to which public officials must conform; *Forrester* holds that judges should be treated like other officials to the extent they play administrative roles. Judges are **supposed** to look over their shoulders when making administrative decisions, just as other public officials must; that is the rationale of *Forrester*, which treated absolute immunity as a harsh medicament, to be administered sparingly.

Judge Krajewski might respond that to change an immunity rule retroactively would dissipate part of the benefit of immunity. Absolute immunity is designed not only to prevent erroneous decisions and spare judges the costs of discovery and trial, but also to promote fearless action. A judge concerned about the possibility of legal change would act as if at risk, even when the rule then in force was nominally "absolute" immunity. To preserve the benefits of truly absolute immunity, the argument would conclude, courts must enforce whatever rule prevailed at the time of the acts. This argument loses its punch, however, if we assume—as judges of inferior courts must—that the rule applied by the Supreme Court today is superior to the rule in force earlier. The possibility of change will induce judges and other public officials to behave more like they would have behaved under the "correct" rule. For example, if absolute immunity were the rule in 1985, and a judge feared that it would be replaced by qualified immunity, he would take some extra care. But we now know that this is a good thing. Simi-

larly, if the rule in 1985 had been qualified immunity, only to be replaced by absolute immunity, a judge with his eye on the development of the law would have taken a little less precaution in 1985 than the prevailing rule seemed to require, and we would know from the adoption of the new rule that this, too, was a move in the right direction. Anticipation of change in rules of liability always induces improvements, if the "new" rules are better than the "old".

For what it is worth, we doubt that a reasonable judge would have believed in December 1985 that he had absolute immunity when firing public defenders. Six years earlier the Supreme Court had held that Members of Congress, whose general immunity is as absolute as that of judges, may be liable for employment discrimination. *Davis v. Passman*, 442 U.S. 228 (1979). Simultaneously with *Forrester*, this court released an opinion holding that judges are not absolutely immune when firing court reporters. *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986). The opinions of both panels recognized that judges ordinarily are not absolutely immune when making administrative decisions; the immunity covers only "judicial" acts. *Forrester* portrayed its holding as a narrow exception to the rule, one depending on the interaction between judge and probation officer in fulfilling judicial tasks. Even so, one judge dissented, and the Supreme Court unanimously reversed. Public defenders are advocates, not judicial officers; they are farther removed from core judicial functions than are the court reporters dealt with in *McMillan*. The magistrate denied Krajewski's motion for summary judgment before the Supreme Court's decision in *Forrester*. See also *McDonald v. Krajewski*, 649 F. Supp. 370, 373-76 (N.D. Ind. 1986) (a pre-*Forrester* decision rejecting Judge Krajewski's immunity defenses in the case of a politically-motivated discharge of a clerk-secretary in Judge Krajewski's court). The Supreme Court's opinion in *Forrester* did not strip from Judge Krajewski an immunity he previously enjoyed.

IV

Kurowski and Nicholls recovered about $14,000 for their attorneys' fees under §1988. This is less than 25% of the monetary recovery, and of course plaintiffs won reinstatement to boot. The request—the magistrate gave plaintiffs everything they wanted—was modest as requests go in civil rights litigation. See *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (award of about $245,000 in a case with damages under $34,000). It was also less than the contingent-fee benchmark that we have said is appropriate, when such a fee provides adequate compensation. *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986). Appellate review of an award is deferential, see *City of Riverside*, and the magistrate did not abuse his discretion in giving plaintiffs 100% of a modest request. All litigation should be conducted so frugally!

Krajewski challenges the attorneys' hourly rate ($100 per hour for the two lawyers, one of whom is a professor of constitutional law at Valparaiso University), the fact that two lawyers worked on the case, counsel's dedication of a few hours' research to ideas that did not pan out (one of which was not even raised at trial), and—apparently the crowning blow in defendant's mind—the submission of a bill for 1.6 hours' time to prepare the request for fees.

The bill in this case is an impressively low figure for taking a case through discovery, several rounds of motions for summary judgment, and trial. The request in *Kirchoff* for less work (ending in a lower recovery) was $50,000, and we held an award of only $10,000 to be an abuse of discretion. In *Frantz v. United States Powerlifting Federation*, 836 F.2d 1063 (7th Cir. 1987), counsel asked for $44,000 for less work than this case required; in *In re Central Ice Cream Co.*, 836 F.2d 1068 (7th Cir. 1987), on statement of fees, 1988 U.S. App. LEXIS 2895 (Mar. 2, 1988), counsel requested about $65,000 for monitoring a case while it was not being briefed, and we awarded $20,000 for this task.

It is fair to judge a pudding by the eating, and fair to judge litigating decisions by their results. The use of two (or more) lawyers, which solvent clients commonly pay for because they believe extra help beneficial, may well reduce the total expenditures by taking advantage of the division of labor. The results in this case suggest that this benefit has been realized. The scholar did the research, the litigator the litigating. Awards of fees under §1988 are supposed to give counsel the market rate for their time, *Blum v. Stenson*, 465 U.S. 886, 892-95 (1984), and the kinds of billing and staffing arrangements struck when clients must pay their own lawyers are the best benchmarks of the arrangements (and bills) appropriate under §1988. See *Bohen v. City of East Chicago*, 666 F. Supp. 154 (N.D. Ind. 1987). The use of two lawyers was appropriate here, as it was in *Bohen*—a case in which counsel spent more time (and were awarded more than $30,000) to achieve lesser results. The hourly rate of $100 is appropriate in the Northern District of Indiana; the magistrate has experience with the billing rates in that market, and we are not inclined to disturb his judgment.

That the lawyers spent some time in blind alleys is irrelevant; this is inevitable, and the hourly rate reflects the fact that not all time is equally productive. It would be possible, but silly, to bill $150 for productive time and nothing for other time; the standard hourly rate reflects the standard productivity of time. *Hensley v. Eckerhart*, 461 U.S. 424, 433-35 (1983), says that the court should subtract time for losing claims, but a losing argument in support of a successful claim for relief is fully compensable time. *Lenard v. Argento*, 808 F.2d 1242 (7th Cir. 1987). This is still another aspect of the point that the hourly rate includes hours with different degrees of productivity. The defendant need only compensate plaintiff for fees to the extent plaintiff succeeds; losing claims are not compensable; but this suit was 100% successful. As for Krajewski's *bête noire*, the request for $160 to prepare the bill: counsel are entitled to full compensation, including the time spent pursuing requests for fees. *Muscare v.*

Quinn, 680 F.2d 42 (7th Cir. 1982). This request is the smallest we have ever seen for this function, and we commend plaintiffs' counsel for their parsimony.

Counsel are entitled to full compensation under §1988 for productive work. The work in this case was completely successful. The plaintiffs' appellate briefs and argument (for which plaintiffs are entitled to further compensation under §1988) were first-rate. Niggling objections such as those raised by Krajewski simply increase the ultimate bill and waste judicial time. We trust that the Attorney General of Indiana will in future abjure the buckshot approach to appellate litigation.

AFFIRMED

A true Copy:

Teste:

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JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

the Seventh Circuit
Chicago, Illinois 60604

June 2, 1988.

Before

HON. HARLINGTON WOOD, JR., *Circuit Judge*

HON. JOHN L. COFFEY, *Circuit Judge*

HON. FRANK H. EASTERBROOK, *Circuit Judge*

STEVEN A. KUROWSKI and DAVID H. NICHOLLS, *Plaintiffs-Appellees*,		) Appeals from the United States District Court for the Northern District of Indiana, Hammond Division.) No. 86 C 586) Mag. Andrew P. Rodovich
Nos. 87-2675 87-3016	vs.	
JUDGE JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III, *Defendant-Appellant.*		)

This cause was heard on the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

United States District Court

NORTHERN DISTRICT OF INDIANA —
HAMMOND DIVISION

STEVEN A. KUROWSKI and
DAVID H. NICHOLLS

v.

JUDGMENT IN A
CIVIL CASE

JUDGE JAMES J. KRAJEWSKI,
Individually and in his capacity
as Judge of the Lake County Court,
Division III, et al

CASE NUMBER:
H86-586

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, David H. Nicholls, and against the defendant, Judge James J. Krajewski, and damages are assessed as follows: loss wages in the amount of $24,500.00, loss benefits in the amount of $6,625.00, emotional distress in the amount of $500.00, and punitive damages in the amount of $1,000.00.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the plaintiff, Steven A. Kurowski, and against the defendant, Judge James J. Krajewski, and damages are assessed as follows: loss wages in the amount of $24,500.00, loss benefits in the amount of $2,450.00, emotional distress in the amount of $500.00, and punitive damages in the amount of $1,000.00.

Plaintiffs, David H. Nicholls and Steven A. Kurowski, are ORDERED reinstated. Reinstatement stayed for 30 days.

The plaintiffs given 30 days to file request for attorney fees.

It was further ORDERED on April 15, 1987 that defendant, The Board of Commissioners of the County of Lake, be DISMISSED.

It was further ORDERED on September 9, 1987 that defendant, Lake County Council, be DISMISSED.

(Current interest rate is 7.88%)

October 1, 1987
Date

RICHARD E. TIMMONS
Clerk

Jason R. Holderman
(By) Deputy Clerk

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS, OCTOBER 1, 1987

THE COURT: I have said on a number of occasions sometimes in pretrial conferences, once that I can think of in a written decision that I have some fairly strong disagreements with the Supreme Court cases of Elrod versus Burns and Branti versus Finkel. My own personal belief is that the dissenting opinion of Justice Powell is the better reason and more correct statement of the law.

However, regardless of whether I happen to agree with a decision of the Supreme Court, it is my obligation to follow it, just as it is the obligation of the various county officials in Lake County to follow it as well. In my previous orders of January 28 of this year and September 22, I ruled on the legal issues, in particular, the issue of immunity and the issue as to whether or not the public defenders were to use the terms initially used in Elrod confidential or policy making.

I found in my last decision that politics could not be a factor in firing public defenders for the reasons I set forth in that September opinion. So the only issue before the court today is whether or not these two gentlemen were fired for political reasons, and I believe that they were. They both testified as to a number of statements that Judge Krajewski made during his conversations with them explaining why they would not be retained.

In reviewing the deposition of Judge Krajewski which was admitted into evidence, when confronted with a number of these statements, he said, "I might have." He never specifically denied making them either in court today or in his deposition. Judge Krajewski himself in the deposition and today indicated that both plaintiffs were performing their duties adequately. I think at one time he said they did a fine job. His defense tendered that there was a taint upon the court. There was no investigation which would in any way justify that.

I do not see how dismissing two or three public defenders without investigating either their actions or the conduct of the

other employees in the court, I do not believe that that sets forth a good faith reason for the discharges. In other words, to the extent that the defense of a taint or stigma upon the court has been raised, I reject that defense. I do not find it as being based upon the credible evidence in the case.

In reviewing the evidence that was introduced on lost wages, I believe that it is undisputed that both plaintiffs would have incurred a salary deduction or reduction to $14,000.00 as of the first of the year. The first of the year being January 1st of '86. So the only loss of wages that they are entitled to would have to be based upon that salary as opposed to what they were making at the time through the end of this previous month, September 30, yesterday.

I find for each plaintiff that the lost wages were $24,500.00. I find that the lost benefits for Mr. Nicholls based upon his testimony concerning the amounts spent on insurance less a setoff for the amounts he would have had to pay were $6,625.00. For Mr. Nicholls, the total special damages is $31,125.00.

Based on Mr. Kurowski's testimony concerning his benefits, again with the appropriate setoff, I find that his benefits, the insurance loss, was $2,450.00, so that would total $27,450.00.

With the claim of each plaintiff for emotional distress of the humiliation of the stigma of being fired, they both testified that they have been experienced attorneys, Mr. Nicholls for 20 years, Mr. Kurowski for I believe it was 16 or 17 years, both of them have held many public jobs.

I can understand a disappointment in losing a public job, but I discount the severe emotional disturbance that they claimed, because of that, in each case I will award damages in the amount of $500.00 for the emotional distress incurred by each plaintiff.

The question of punitive damages is a close question. Judge Krajewski could have fired everybody there. I do not mean he could have fired them legally, but he could have engaged in a wholesale political purge which would have more clearly dem-

onstrated bad faith on his part. On the other hand, he did mention a reference or familiarity to Branti, he did indicate that he had read it.

Judge Krajewski, unlike several defendant public officials that come into the court, is a lawyer and should understand it better than the average public official. The comment about he expected to be sued and probably shouldn't be saying what he said, those trouble me. But I think the thing that troubles me the most, when I determine the state of mind of Mr. Krajewski and whether it showed a deliberate disregard for the rights of plaintiffs in this case, is his reference here on the stand to Judge Anderson attempting to appoint one of his stooges, and his comments in his deposition that were addressed on cross-examination about Democrats being greedy and stupid, stupid later was changed to ignorant, apparently. I think those types of comments show the requisite indifference to the rights of plaintiffs in this case. I will award punitive damages in the amount of $1,000.00 for each plaintiff. I will direct the clerk to enter judgment accordingly. I will give the plaintiffs 30 days in which to file the usual request for attorney fees.

Anything further from either side?

MRS. LEVINSON: Excuse me, Your Honor. Reinstatement?

THE COURT: Yes, I will order them reinstated. Anything further?

MR. ARTHUR: Can we ask for the order of reinstatement to be stayed for a period of 30 days to be decide whether or not to appeal?

THE COURT: Any back pay or any pay will start running as of today's date, but I will stay the order of reinstatement for 30 days. In other words, if they are reinstated, the pay will run as of this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

STEVEN A. KUROWSKI and DAVID H. NICHOLLS,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. H 86-586
JUDGE JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III; and THE LAKE COUNTY COUNCIL,	)	
Defendants.	)	

ORDER

This matter is before the court on a Motion for Summary Judgment filed by the defendant, Judge James J. Krajewski, on August 11, 1987, and a Motion for Partial Summary Judgment filed by the plaintiffs, Steven A. Kurowski and David H. Nicholls, on August 19, 1987. For the reasons set forth below, defendant's Motion for Summary Judgment is DENIED and plaintiffs' Motion for Partial Summary Judgment is GRANTED.

Background

In January, 1979, the plaintiff, David H. Nicholls (hereafter Nicholls), was appointed Public Defender of the Lake County Court, Division III, by Judge Orval Anderson. In July, 1981, the plaintiff, Steven A. Kurowski (hereafter Kurowski), also was appointed Public Defender of the Lake County Court, Division III, by Judge Anderson. Nicholls and Kurowski, both Democrats, supported Judge Anderson's election campaigns in 1976, 1980 and 1984.

In June, 1985, Judge Anderson resigned and Judge James J. Krajewski (hereafter Judge Krajewski) was appointed to replace him. On December 12, 1985, Judge Krajewski fired Nicholls and Kurowski effective January 1, 1986. Judge Krajewski allegedly informed Nicholls and Kurowski that they were being replaced by members of the Republican party.

Discussion

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper only if it is demonstrated "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *McGraw-Edison v. Walt Disney Products*, 787 F.2d 1163, 1167 (7th Cir. 1986); *Federal Deposit Insurance Corporation v. Meyer*, 781 F.2d 1260, 1267 (7th Cir. 1986); *Ross v. Franzen*, 777 F.2d 1216, 1220 (7th Cir. 1985); and *Big O Tire Dealers, Inc. v. Big O Warehouse*, 741 F.2d 160, 163 (7th Cir. 1984). The burden is upon the moving party to establish that no material facts are in genuine dispute, and any doubt as to the existence of a genuine issue must be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160, 90 S.Ct. 1598, 1610, 26 L.Ed.2d 142, 155 (1970); *Backes v. The Valspar Corporation*, 783 F.2d 77, 79 (7th Cir. 1986); and *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985). A fact is material if it is outcome determinative under applicable law. *Shlay v. Montgomery*, 802 F.2d 918, 920 (7th Cir. 1986); and *Big O Tire Dealers, Inc.*, 741 F.2d at 163. Even if the facts are not in dispute, summary judgment is inappropriate when the information before the court reveals a good faith dispute as to inferences to be drawn from those facts. *Powers v. Dole*, 782 F.2d 689, 694 (7th Cir. 1986); *Munson*, 754 F.2d at 690; and *Burns v. Rockford Life Insurance Company*, 740 F.2d 542, 546 (7th Cir. 1984). Finally, summary judgment generally is not an appropriate means of resolving questions of motive and intent. *Bartman v. Allis-Chalmers Corporation*, 799 F.2d 311, 312 (7th Cir. 1986); *P.H. Glatfelter Company v. Voith Incorporated*, 784 F.2d 770, 774 (7th Cir. 1986); and *Munson*, 754 F.2d at 690.

In deciding a motion for summary judgment, the trial court must determine whether the evidence presented by the party opposed to the summary judgment is such that a reasonable jury might find in favor of that party after a trial.

> The inquiry performed is the threshold inquiry of determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.
>
> [T]his standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict.
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> *Anderson v. Liberty Lobby, Inc.*, _____ U.S. _____, _____, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986).

See also: *Celotex Corporation v. Catrett*, _____ U.S. _____, _____, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265, 273 (1986); *Barker v. Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 496 (7th Cir. 1986); and *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 436 (7th Cir. 1986).

Judge Krajewski, while not conceding that the plaintiffs were terminated on the basis of political affiliation, assumes for the purposes of these motions that the plaintiffs were terminated for political reasons. However, Judge Krajewski contends that the plaintiffs were confidential or policymaking employees who could be terminated on the basis of political affiliation. Yet, plaintiffs, while conceding that the question of whether politics entered into the decision to fire them is contested, contend that their positions were protected by the First and Fourteenth Amendments. Plaintiffs are seeking partial summary judgment on the issue of whether party affiliation is an appropriate requirement for the position of public defender.

Non-policymaking, non-confidential government employees cannot be discharged solely for exercising their First Amendment freedoms such as political beliefs, expression and associa-

tion. *Branti v. Finkel*, 445 U.S. 507, 517, 100 S.Ct. 1287, 1294, 63 L.Ed.2d 574, 583 (1980); *Elrod v. Burns*, 427 U.S. 347, 375, 96 S.Ct. 2673, 2690, 49 L.Ed.2d 547, 566 (1976); *Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983); and *McClure v. Cywinski*, 686 F.2d 541, 544 (7th Cir. 1982). However, policymaking or confidential employees can be fired on political grounds without violating the employees First Amendment rights. *Branti*, 445 U.S. at 517, 100 S.Ct. at 1294, 63 L.Ed.2d at 583; *Elrod*, 427 U.S. at 367, 96 S.Ct. at 2686, 49 L.Ed.2d at 562; *Soderbeck v. Burnett County, Wisconsin*, 752 F.2d 285, 288 (7th Cir. 1985), *cert. denied* 471 U.S. 117, 105 S.Ct. 2360 (1985); *Shakman v. Democratic Organization of Cook County*, 722 F.2d 1307, 1309-10 (7th Cir. 1983); and *Rateree v. Rockett*, 630 F.Supp. 763, 773 (N.D. Ill. 1986). The defendant carries the burden of proof on the issue of whether employees are policymaking or confidential. *Elrod*, 427 U.S. at 368, 96 S.Ct. at 2687, 49 L.Ed.2d at 562; *Rodez v. Village of Maywood*, 641 F.Supp. 331, 337 (N.D. Ill. 1986); *Grossart v. Dianaso*, 758 F.2d 1221, 1226 (7th Cir. 1985); and *Nekolny v. Painter*, 653 F.2d 1164, 1169 (7th Cir. 1981).

The purpose of the policymaking exception is to ensure that the First Amendment's protection does not interfere with the workings of a democratic government and the ability of duly elected officials to implement their policies. *Elrod*, 427 U.S. at 367, 96 S.Ct. at 2686, 49 L.Ed.2d at 562; and *Shakman*, 722 F.2d at 1310. But the ultimate inquiry is not whether the employee is labeled "policymaking" or "confidential," rather whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved. *Branti*, 445 U.S. at 518, 100 S.Ct. at 1294, 63 L.Ed.2d at 584; *Tomczak v. City of Chicago*, 765 F.2d 633, 640 (7th Cir. 1985), *cert. denied* 106 S.Ct. 313 (1986); *Delacruz v. Pruitt*, 590 F.Supp. 1296, 1303 (1984); and *Malcak v. Cooney*, 93 F.R.D. 830, 832 (N.D. Ill. 1982).[1/]

[1/] Although the Seventh Circuit has persisted in utilizing the terms of "policymaker" and "confidential" in determining whether political affiliation can be considered for certain positions, as in *Nekolny*, *Soderbeck*, and *Tomczak*, the policymaking exception is best viewed as a subset of the more

(Footnote continued)

The Seventh Circuit's reiteration of the *Branti* formulation has emphasized the function of the office involved and has determined that an employee's position is unprotected if there is room for principled disagreements in the decision reached by the employee and his superiors and the employee has meaningful direct or indirect input into the decisionmaking process. *Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985); *Tomczak*, 765 F.2d 633 at 641; *Grossart*, 758 F.2d at 1226; *Nekolny*, 653 F.2d at 1170; *Lindahl v. Bartolomei*, 618 F.Supp. 981, 987 (D.C. Ind. 1985); and *Delacruz*, 590 F.Supp. at 1304. The court is to examine the powers inherent in a given office, not the functions performed by a particular occupant. *Tomczak*, 765 F.2d at 640-42; and *Rodez*, 641 F.Supp. at 336-337. In determining the powers of the office, the court looks to the following:

(1) the nature and number of responsibilities of the office;

(2) whether responsibilities are not well defined or are of broad scope;

(3) whether the responsibilities include acting as an advisor for formulating or implementing policy and goals;

(4) whether the position includes control of a budget and employees, and, if so, how much and how many, respectively;

Footnote 1 continued

inclusive exception announced in *Branti*. *Grossart*, 758 F.2d at 1227 n.4. *See Meeks v. Grimes*, 779 F.2d 417, 420 (7th Cir. 1985) (while *Branti* establishes the central line of inquiry, it is erroneous to say that the policymaking and confidential categories are no longer useful); *Patkus v. Sagamon-Cass Consortium*, 769 F.2d 1251, 1259 n.3 (7th Cir. 1985); and *McDonald v. Krajewski*, 649 F.Supp. 370, 379 (although *Branti* and *Nekolny* establish the standards, the exception in *Elrod* remains quite useful). *See also Branti*, 445 U.S. at 518, 100 S.Ct. at 1294 (not all those who make policy should forfeit their First Amendment rights: "The coach of a state university's football team formulates policy, but no one could seriously claim that Republicans make better coaches than Democrats").

(5) whether the position calls for close work with high government officials, making personal loyalty an appropriate consideration; and

(6) the salary level of the position, as compared to other positions within the governmental entity.

Rodez, 641 F.Supp. at 336.

See also, *Elrod*, 427 U.S. at 367-68, 96 S.Ct. at 2687, 49 L.Ed.2d at 562; *Tomczak*, 765 F.2d at 642; *Shakman*, 722 F.2d at 1309; and *Nekolny*, 653 F.2d at 1170.

There are no material facts in dispute concerning the functions of the public defenders or their relationship to the judge. It is undisputed that the plaintiffs had no written guidelines or guidance from the court or the chief public defender (other than days to work) as to the manner in which they would carry out their responsibilities. (Defendant's Findings of Fact 4-9; Plaintiffs' Memorandum in Opposition, p. 2; and Plaintiffs' Findings of Fact 5). Both parties agree that public defenders were independent policymakers and that it would be unwise for the judge to direct how they perform their tasks because that would "undermine the integrity of the pauper system." (Defendant's Memorandum in Support p. 7; Plaintiffs' Motion in Opposition p. 3-4). It is also undisputed that the judge did not oversee the plaintiffs' work (Defendant's Findings of Fact 11; Plaintiffs' Memorandum in Opposition p. 2). Based on these facts, the plaintiffs simply were not an integral part of the daily routine in the judge's chambers such that their positions as public defenders would interfere with the appointed judge's implementation of his policy. *See Meeks*, 779 F.2d at 421. Plaintiffs only area of decisionmaking authority, while broad, related to the needs of their clients, and plaintiffs had no decisionmaking authority in areas where there could be principled disagreements about the implementation of the judge's policies. Further, these facts do not show meaningful direct or indirect input by the plaintiffs into the judge's decisionmaking process. *See Meeks*, 779 F.2d at 424; *Grossart*, 758 F.2d at 1227; *Lindahl*, 618 F.Supp. at 987; and *Delacruz*, 590 F.Supp. at 1304.

Judge Krajewski has not shown that it would be necessary to replace the plaintiffs with his own supporters to ensure the smooth functioning of his office if, in fact, the plaintiffs were not implementing the judge's policies. Accordingly, the very nature of the public defenders job did not call for close work with government officials, namely the judge, making personal loyalty an appropriate consideration. The plaintiffs responsibilities did not include control of the budget or the supervision of other employees. *See also Government Development Bank for Puerto Rico v. DeChoudens*, 801 F.2d 5, 10 (1st Cir. 1986), *cert. denied* 107 S.Ct. 1886 (1987) (fact that employee has power to make policy generally is not relevant unless the employee is setting policy for his employer).

The very nature and the duties of public defenders have been described by the Supreme Court as follows:

> "[T]he primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibility is the ability to act independently of the government and to oppose it in adversary litigation."
>
> *Branti v. Finkel*, 445 U.S. 507, 519, 100 S.Ct. 1287, 1295, 63 L.Ed.2d 574, 584 (1980) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979)).

The Court concluded, "[t]hus, whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any partisan political interests." *Branti v. Finkel*, 445 U.S. at 519, 100 S.Ct. at 1295, 63 L.Ed.2d at 584.

In *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509, (1981) the Supreme Court again discussed the

nature of a public defender's office and held that the actions of a public defender were insufficient to establish action "under color of state law" for purposes of 42 U.S.C. §1983:

> First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior. Held to the same standards of competence and integrity as a private lawyer, see *Moore v. United States*, 432 F.2d 730 (CA3 1970), a public defender works under canons of professional responsibility that mandate his excercise of independent judgment on behalf of the client. "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." DR5-107(B), ABA Code of Professional Responsibility (1976).
>
> Second, and equally important, it is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages . . . There can be no fair trial unless the accused receives the services of an effective and independent advocate . . .
>
> *Dodson*, 454 U.S. at 321-22; 102 S.Ct. at 451-52; 70 L.Ed.2d at 518-19.

See also Walberg v. Israel, 766 F.2d 1071, 1074-75 (7th Cir. 1985) *cert. denied* 106 S.Ct. 546 (1986) (a system where the trial court judge appointed defense counsel and approved their fees created a division of loyalties and a fatal conflict of interest such that defendant was deprived of his constitutional right to assistance of counsel by the state court). *But see Livas v. Petka*, 711 F.2d 798, 800 (7th Cir. 1983) (political consideration can be an appropriate requirement for the effective performance of a public prosecutor's duties).

The nature of the office of public defender and the relationship to the judge is more akin to that of the court reporter in *McMillan v. Svetanoff*, 793 F.2d 149, 152 (7th Cir. 1986) *cert. denied*, 107 S.Ct. 574 (1986), than the probation officer in *Forrester v. White*, 792 F.2d 647, 657 (7th Cir. 1986) *cert. granted*, 107 S.Ct. 1282 (1987), who had meaningful input and provided crucial information necessary to the judge in making decisions.

Defendant further contends that plaintiffs were policymakers when sitting as judges *pro tem*. In the present case, the plaintiffs were public defenders not judges, although on occasion they along with other practicing attorneys in Lake County were asked to sit as judges *pro tem*. Yet, it is undisputed that when the plaintiffs served in such a capacity, they acted in accordance with the Indiana Statutes and not under any direction from the judge. (Defendant's Findings of Fact 17; Plaintiffs' Findings of Fact 6). Defendant even concedes that "the policy that was made [while sitting *pro tem*] was not binding upon the judge." (Memorandum in Support of Summary Judgment, p. 4). Since the plaintiffs acted in an independent fashion, they were free to exercise their discretion and were not expected to carry out policy for the judge.

Therefore, Judge Krajewski's argument that the plaintiffs were confidential employees when they sat as judge *pro tem* also must fail. Judge Krajewski cannot rest on his assertion that the plaintiffs were confidential employees without showing why there is a need for loyalty and trust on the part of the plaintiffs if they are not guided by the judge nor implementing his policies. A confidential position encompasses those government employees who, while not decisionmakers, are in close contact with policymakers and the highly confidential communication or records affecting decisions. *Meeks*, 779 F.2d at 420. *See also Soderbeck*, 752 F.2d at 288. When sitting as judges *pro tem*, the plaintiffs were bound to protect the sanctity of the court as an institution, but not as confidants of Judge Krajewski.

In *Meeks*, the court failed to accept defendant's contention that access to court records by bailiffs, when coupled with political animosity, created a serious threat of politically moti-

vated breaches of the confidentiality of the judicial process. Rather, the court held that:

> [T]hese bailiffs are duty bound to protect the sanctity of the Court, and, while political affiliation may be an acceptable proxy for loyalty, trust, and maybe even efficiency, it would cast the net of the *Elrod* exception too wide to allow political support to be used to extrapolate a tendency to breach a sworn duty, behave unprofessionally or commit criminal acts.
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> 779 F.2d at 421.

Additionally, Judge Krajewski in his deposition stated that the confidentiality of the position never entered into his decision to fire the plaintiffs. (Plaintiffs' Memorandum in Opposition p. 7; Deposition of Krajewski, p. 31).

Due to the independence of the public defenders office and their adversarial position with the state, plaintiffs, unlike the plaintiff in *Tomczak*, are not in a position where political affiliation could affect the ability of the newly appointed judge to implement his policies. Absent proof that the public defender's position involved meaningful input into decisionmaking areas where there could be principled disagreements, the defendant has failed to fulfill its burden under *Branti* to establish that "party affiliation is an appropriate requirement for the effective performance of the public office involved." Therefore, plaintiffs are entitled to judgment as a matter of law because Judge Krajewski "has failed to make a sufficient showing on an essential element of [his] case with respect to which [he] has the burden of proof." *Celotex Corp.*, 106 S.Ct. at 2553, 91 L.Ed.2d at 273.

Based on the foregoing, the Defendant's Motion for Summary Judgment is DENIED and Plaintiffs' Motion for Partial Summary Judgment is GRANTED.

ENTERED this 22 day of September, 1987.

/s/ Andrew P. Rodovich

Andrew P. Rodovich
United States Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

STEVEN A. KUROWSKI and DAVID H. NICHOLLS,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. H 86-586
JUDGE JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III; THE BOARD OF COMMISSIONERS OF COUNTY OF LAKE, and THE LAKE COUNTY COUNCIL,	)	
Defendants.	)	

ORDER

This matter is before the Court on a Motion to Dismiss Plaintiffs' Amended Complaint filed by the defendant, Judge James J. Krajewski (hereafter Krajewski), on November 26, 1986. For the reasons set forth below, the motion is hereby DENIED.

Background

In January, 1979, the plaintiff, David H. Nicholls (hereafter Nicholls), was appointed Public Defender of the Lake County Court, Division III, by Judge Orval Anderson. In July, 1981, the plaintiff, Steven A. Kurowski (hereafter Kurowski), also was appointed Public Defender of the Lake County Court, Division III, by Judge Anderson. Nicholls and Kurowski, both Democrats, supported Judge Anderson's election campaign in 1976, 1980 and 1984.

In June, 1985, Judge Anderson resigned and Judge Krajewski was appointed to replace him. On December 12, 1985, Judge Krajewski fired Nicholls and Kurowski effective January 1, 1986. Krajewski informed Nicholls and Kurowski that they were being replaced by members of the Republican party.

Discussion

Judge Krajewski contends that he is entitled to absolute immunity for his decision to terminate the plaintiffs or, in the alternative, that the doctrine of qualified immunity bars an award of damages against him. Judge Krajewski also argues that the plaintiffs were confidential policymaking employees and that he could dismiss them for political reasons. The plaintiffs, however, contend that absolute immunity does not extend to injunctive or declaratory relief; that Judge Krajewski is not entitled to absolute immunity for employment decisions; and that he is not entitled to qualified immunity because he violated their clearly established first amendment rights of political association.

Absolute Immunity

Absolute immunity shields a judge from civil liability and related trial proceedings for " 'judicial acts' committed in the exercise of his 'jurisdiction.' " *Forrester v. White*, 792 F.2d 647, 651 (7th Cir. 1986). *See also McMillan v. Svetanoff*, 793 F.2d 149, 151 (7th Cir. 1986). A judicial act is defnied as an act normally performed by a judge when the parties involved are dealing with that judge in his judicial capacity. *McMillan*, 793 F.2d at 151. Absolute immunity, however, is not a bar to injunctive relief, *Forrester*, 792 F.2d at 651, but it shields a judge from civil liability for some personnel decisions. *McMillan*, 793 F.2d at 151; and *Forrester*, 792 F.2d at 654. If a court finds that "an employee's duties are intimately related to the functioning" of the judicial process "then personnel decisions regarding that employee are also part of the [judicial] process." *Forrester*, 792 F.2d at 655.

In *Forrester*, the court granted absolute immunity to a judge for firing a probation officer. The court examined the functions performed by the probation officer and found that they "were inextricably tied to discretionary decisions that have consistently been considered judicial acts." *Forrester*, 792 F.2d at 657. Specifically, the *Forrester* court looked to the probation officer's advice and recommendations to the judge regarding sentencing, probation and the revocation of parole and probation. *Forrester*, 792 F.2d at 657. *See also Pruitt v. Kimbrough*, 536 F.Supp. 764, 767 (N.D. Ind. 1982) aff'd, 705 F.2d 462 (7th Cir. 1983) (judge granted absolute immunity for his decision to fire a probation officer); and *Blackwell v. Cook*, 570 F.Supp. 474, 478-79 (same).

In contrast, the *McMillan* court refused to extend judicial immunity to a judge when he terminated a court reporter. The court found that "allowing judges to hire and fire court reporters with impunity will not further the objectives of the judicial immunity doctrine — principled decisionmaking." *McMillan*, 793 F.2d at 155.

The Seventh Circuit has not addressed the precise issue before this Court. However, the *Forrester* and *McMillan* analyses persuade this Court to conclude that absolute immunity should not extend to a judge's decisions to hire or to fire public defenders. It is clear that Judge Krajewski's decisions to terminate public defenders do not implicate the judicial decisionmaking process:

> Hiring and firing of employees is typically an administrative task. It involves decisions of a personal rather than impartial nature, which is integral to judicial decisionmaking. The decision to fire the plaintiff did not involve judicial discretion; in other words, the judge did not utilize his education, training, and experience in the law to decide whether or not to retain plaintiff. The administrative act of firing the plaintiff will not assist the judge in interpreting the law or exercising judicial discretion in the resolution of the disputes. Certainly the court reporter assists the judge in his or her official capacity, but so

> does everyone else employed within the judge's chambers — the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor — they all assist in the smooth operation of the judicial process. That, however, does not entitle a judge to absolute immunity in all employment-related decisions. Providing judicial immunity in employment actions alleging civil rights violations will not further the objective of the doctrine. The judge will not be more inhibited in rendering decisions because he may be called to task for firing a court reporter.
>
> *McMillan*, 793 F.2d at 155.

It is true that a public defender is more closely involved in the judge's decisionmaking process than the court reporter. However, the Supreme Court has examined the public defender's role in the judicial process and found that the public defender has an obligation to represent his clients against the State "and that the State has a 'constitutional obligation . . . to respect the professional independence of the public defenders whom it engages.' " *Polk County v. Dodson*, 454 U.S. 312, 321-22, 102 S.Ct. 445, 451, 70 L.Ed.2d 509, 518 (1981). *See also Ferri v. Ackerman*, 444 U.S. 193, 201, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979). It is clear that a public defender must exercise independent judgment free from judicial direction.

In addition, the Eighth Circuit recently denied absolute immunity finding that although a hearing officer gave advice to a judge, the advice "was of a formal, detached nature, from one judicial officer to another." *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 548 (8th Cir. 1984). The public defender's relationship to the judge is more akin to the hearing officer than the probation officer. Because as public defenders the plaintiffs were required to exercise independent judgment, their relationship with Judge Krajewski was "too distant to implicate the substance of [the] judge's decisions." *See Forrester*, 792 F.2d at 657 (citing *Goodwin*, 729 F.2d at 548-49). When Judge Krajewski terminated the plaintiffs, he therefore was acting in an administrative or ministerial capacity and is not entitled to absolute immunity. *See Henry v. Farmer City*

State Bank, _____ F.2d _____ (7th Cir. slip opinion decided December 29, 1986, at p. 18) ("immunity normally extended to those performing discretionary and not ministerial acts"); *Richardson v. Koshiba*, 693 F.2d 911, 914 (9th Cir. 1982) (judicial selection committee acted in executive capacity when appointing state court judge); and *Lewis v. Blackburn*, 555 F.Supp. 713, 723 (W.D. N.C. 1983) (judge acted in a ministerial capacity when appointing magistrate).

Qualified Immunity

Qualified immunity shields government officials from "civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). It is true, as the plaintiffs contend, that the law regarding patronage dismissals of public defenders was clearly established in 1980. *Branti v. Finkel*, 445 U.S. 507, 519, 100 S.Ct. 1287, 1295, 63 L.Ed.2d 574, 585 (1980). In *Branti*, the Supreme Court unequivocally ruled that

> it would undermine, rather than promote, the effective performance of an assistant public defender's office to make his tenure dependent on his allegiance to the dominant political party.
>
> *Branti*, 445 U.S. at 519-20, 100 S.Ct. at 1295, 63 L.Ed.2d at 585.

Krajewski terminated Nicholls and Kurowski five years after the Supreme Court handed down the *Branti* decision. Thus, the law was clearly established. Since Krajewski does not claim extraordinary circumstances, and this Court has found none, he is not entitled to qualified immunity. *See Harlow*, 457 U.S. at 819, 102 S.Ct. 2738, 73 L.Ed.2d 411.

First Amendment Claims

The first amendment protects public defenders from political patronage dismissals. *Branti*, 445 U.S. at 519, 100 S.Ct. at 1295, 63 L.Ed.2d at 585. The Supreme Court has determined

that "whatever policymaking occurs in the public defender's office must relate to the needs of individual clients and not to any political interests." *Branti*, 445 U.S. at 519, 100 S.Ct. at 1295, 63 L.Ed.2d at 584-85. Judge Krajewski's argument that the complaint is deficient absent allegations that Nicholls and Kurowski were "nonconfidential, nonpolicymaking employees" is meritless. The plaintiffs base their claim for relief on 42 U.S.C. §1983. Therefore, they are required to allege action taken under color of state law in violation of their federal statutory and/or constitutional rights. *Monroe v. Pape*, 365 U.S. 167, 171-72, 81 S.Ct. 473, 475-76, 5 L.Ed.2d 496-97 (1961). The plaintiffs have alleged that Judge Krajewski's actions were under color of law and were in violation of their first amendment rights. As such, they state a valid claim for relief. *See generally Indiana State Employees Ass'n v. Indiana Republican State Central Committee*, 630 F.Supp. 1194, 1196 (S.D. Ind. 1986) (although the plaintiff failed to allege that the position he applied for was a nonpolicymaking position, the complaint stated a valid claim).

Based on the foregoing, the Motion to Dismiss is DENIED.

ENTERED this 28 day of January, 1987.

/s/ Andrew P. Rodovich

Andrew P. Rodovich
United States Magistrate

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

STEVEN A. KUROWSKI and DAVID H. NICHOLLS,	)	
Plaintiffs,	)	
v.	)	CIVIL NO. H 86-586
JUDGE JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III,	)	
Defendants.	)	

ORDER

This matter is before the court upon certification of facts by United States Magistrate Andrew P. Rodovich, purporting to show contempt pursuant to 28 U.S.C. §636(e). Magistrate Rodovich ordered defendant Judge James J. Krajewski to rehire the plaintiffs in this action. The Magistrate has found that Judge Krajewski "knowingly and intentionally violated the order of this Court by discriminating against the two plaintiffs in the terms and conditions of their employment . . . [and] violated the terms and conditions of the order in . . . suspending the two plaintiffs that were subject to the order." Transcript of Hearing, Nov. 4, 1987, pp. 109-111.

Subsection (e) of 28 U.S.C. §636 provides that certain enumerated acts, when committed before a magistrate, shall constitute a contempt of the district court for the district wherein the magistrate is sitting. Upon certification of the facts constituting the alleged contempt, the district court shall, "in a summary manner, hear the evidence as to the act or conduct complained of and, . . . [if warranted]punish such person in the same manner and to the same extent as for a contempt commit-

ted before a judge of the court." *Id.* On December 21, 1987, the court held a hearing to allow Judge Krajewski to submit additional evidence to show that he should not be found in contempt.

After a thorough review of the transcript of the proceedings before Magistrate Rodovich, the Magistrate's findings, and the evidence submitted at the December 21 hearing, the court hereby ADJUDGES defendant Krajewski in contempt. 28 U.S.C. §636(e)(1). Although his conduct was contemptuous, the facts suggest that plaintiffs tried defendant's patience by showing up at work as the clock struck 8:30 a.m., and not a second sooner. For this reason, awarding them compensatory damages for the contemptuous action is unwarranted. However, defendant Krajewski's intentional flouting of a lawful order of this court shows an utter lack of respect for the law that is exceedingly disappointing to see from a man in his position.

Defendant Krajewski is hereby ORDERED to pay $500.00 to the Clerk of the Court as punishment for his contempt. This fine is to be paid by Judge Krajewski personally; he is not to seek recompense from public funds. The court hopes that Judge Krajewski will obey the law in the future.

ENTERED this 28th day of December, 1987.

/s/ James T. Moody

James T. Moody, Judge
United States District
Court

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS, NOVEMBER 4, 1987

THE COURT: I have been listening to the evidence. I have been listening to your testimony. I have been watching your demeanor, not only throughout this proceeding but the last proceeding. I see nothing but irritation on your part. You sit there just like you were trapped by a train waiting for it to cross so that you can proceed about your business.

I am looking for even the slightest hint of either remorse or concern about the plight that you are in and I see neither. You are here today because you were alleged to have violated a federal court order and it doesn't seem to affect you in the slightest.

Pursuant to the Magistrate's Act 28, United States Code, Section 636, Subsection E, I am certifying the following findings of facts to the District Court: I find by clear and convincing evidence that the defendant, James Krajewski, knowingly and intentionally violated the order of this Court by discriminating against the two plaintiffs in the terms and conditions of their employment.

In particular, I find, as a matter of fact in this case, that the plaintiffs were not late for work, that they arrived at work prior to 8:30 in the morning. To the extent that there is a conflict in the evidence, I find the credibility to be on the side of the plaintiffs and against the defendant.

I further find that there were no written rules for the public defenders prior to October 19th of 1987. And the imposition of written rules was designed in an effort to harass or possibly trap the plaintiffs. They were designed to possibly give the defendant a reason to discipline or discharge the plaintiffs, as he did.

I further find that switching was permitted prior to 1986 when these plaintiffs worked. And that any provision against switching after October 19th, 1987 was designed to discriminate against these plaintiffs and to run afoul of this Court's order.

I further find that Mr. Nicholls did nothing to warrant this suspension, even if the alleged violation of Mr. Kurowski and Mr. Fisher permitted a suspension, which I do not believe it did, Mr. Nicholls had no part in that suspension. The defendant knew that, but nevertheless discharged him.

As I mentioned previously, I find, observing the demeanor of the Defendant Krajewski throughout these proceedings, his conduct is contemptuous of this Court. It is indifferent to his obligations under the Constitution and his oath of office.

In particular, I find that he violated the terms and conditions of the order in discriminating and suspending the two plaintiffs that were subject to the order.

I made a specific recommendation that Judge Moody find the defendant in contempt and impose appropriate sanctions. I will not reduce these findings of facts to writing. I will direct the court reporter to prepare a transcript immediately, to be filed with Judge Moody so he can set this matter for further proceedings, consistent with this order.

Supreme Court, U.S.
FILED
SEP 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-391

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III

Petitioner,

v.

STEVEN A. KUROWSKI and DAVID H. NICHOLLS

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Seventh Circuit correctly applied Branti v. Finkel to hold that party affiliation was not an appropriate requirement for the effective performance of respondents' job of public defender.

Whether any justification exists for this Court to clarify the Branti test or to review its decision protecting the free association rights of government employees.

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No. 88-391

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JAMES J. KRAJEWSKI, Individually and in his capacity as Judge of the Lake County Court, Division III

Petitioner,

v.

STEVEN A. KUROWSKI and DAVID H. NICHOLLS

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Respondents, Steven A. Kurowski and David H. Nicholls, respectfully oppose the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh

Circuit entered in the above-captioned cause on June 2, 1988.

OPINIONS BELOW

In addition to the opinions noted in the Petition for Writ of Certiorari, at page 2, opinions were entered in this case holding the petitioner in contempt of court for violating the order to reinstate the respondents and to refrain from retaliating against them. The Magistrate's findings are reported at A-44 and the Judge's affirmance at A-41 in Appendix to Petition.

JURISDICTION

See Petition for Writ of Certiorari, at page 2.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Petition for Writ of Certiorari, at pages 2-3.

STATEMENT OF THE CASE

This case involves the politically motivated dismissals of the respondents from their positions as public defenders. David H. Nicholls and Steven A. Kurowski were appointed to serve as public defenders of the Lake County Court, Division III, in January, 1979, and July, 1981, respectively. In February, 1985, the petitioner, Judge James Krajewski, was appointed as temporary Judge of Lake County Court, Div. III, and he became permanent Judge of that court in June, 1985. Both respondents, as the petitioner knew, were active Democrats. Tr. 23 and 72. Soon after taking his position, Judge Krajewski told the respondents that although he was pleased with their performance, he was under significant pressure from Republicans for their jobs. Tr. 100-102, 128.

On December 12, 1985, Judge Krajewski fired the respondents, asserting as the only

reason for their discharge the significant political pressure from the Republican party. Tr. 70. There were no accusations of wrong-doing or of a "taint" on the court. Tr. 38 and 71. Contrary to the implications in the petitioner's Statement of the Case, Judge Krajewski never made any allegations or accusations to either of the respondents concerning their involvement in any of the "scams" which lead to the indictments in that court, Tr. 38 and 71; and he conceded at trial that he had no knowledge of any wrong-doing on their part. Tr. 117. The Judge, in fact, asked the respondents on the day he fired them if either would be willing to serve as judge pro tem the following month when he would be on vacation. Tr. 36-37 and 71. As the Court of Appeals found, "This is not the path trod by one intent on turning out rascals." A-8.

More significantly, the petitioner misrepresents the facts concerning the

position of public defender, suggesting that serving as judge pro tem was part of that job. As the Court of Appeals found, "judicial service is not part of a public defender's duties in Indiana." A-6, citing to Indiana Trial Rule 63. Further, respondent Nicholls testified without contradiction that he could not recall ever serving as judge pro tem after Judge Krajewski's appointment in February, 1985, although he was an assistant public defender in his court for eleven months. A-6.

Indiana Trial Rule 63(E) permits a trial judge to appoint a judge pro tempore to serve in his absence, and public defenders, together with many private practicing attorneys in Lake County, were occasionally called upon by the judge to serve. Both courts below found, however, that this did not render judicial service a part of the position of public defender. The Magistrate concluded that the

petitioners here "were public defenders not judges, although on occasion they along with other practicing attorneys in Lake County were asked to sit as judges pro tem." A-33. The Court of Appeals found that there was no material factual dispute regarding the question of whether judicial service was part of a public defender's duties in Indiana. A-6. Thus the courts below, which heard the evidence and are familiar with the operation of the Lake County Court system, held contrary to petitioner's allegation, that serving as judge pro tempore was simply not a part of the job of pauper counsel.

REASONS AND ARGUMENT FOR DENYING THE WRIT

I

THE COURT OF APPEALS CORRECTLY FOLLOWED THE SUPREME COURT HOLDING IN BRANTI v. FINKEL THAT PARTY AFFILIATION IS NOT AN APPROPRIATE REQUIREMENT FOR THE EFFECTIVE PERFORMANCE OF A PUBLIC DEFENDER.

The Supreme Court held in Elrod v. Burns, 427 U.S. 347, 375 (1976) that

government employees may not be dismissed solely for exercising their First Amendment freedoms of political association. Although it left open a possible exception in the case of policymaking or confidential employees, this Court subsequently clarified that, rather than relying upon labels, the relevant question was "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Branti v. Finkel, 445 U.S. 507, 518 (1980). The defendant carries the burden of proof on the issue of whether employees occupy a non-protected position. Elrod, 427 U.S. at 368.

The Supreme Court in Branti specifically examined the same position involved in this case, namely that of public defender, and concluded that this was not a position as to which political affiliation can or should be relevant:

> ...it is manifest that the continued employment of an assistant public defender cannot properly be conditioned upon his allegiance to the political party in control of the county government. The primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the state. 445 U.S. at 518.

The Court, in fact, noted the impropriety of allowing political considerations to enter into the selection of attorneys who serve in the sensitive position of public defender. 445 U.S. 518 n.14. Thus, even if there is some question after Branti as to which positions are protected from political discharge, certainly this is a poor case to resolve the issue because the position of public defender has already been fully explored by this Court.

The petitioner's attempt to characterize the position in question here as "unique" is totally unfounded. As

revealed in the Statement of Facts, Judge Krajewski retained Steven A. Kurowski and David H. Nicholls to serve as public defenders. The fact that public defenders, together with private practicing attorneys in Lake County, were occasionally called upon by the Judge to sit as pro tem did not alter the nature of this position. As the lower courts both found in this case, sitting as judge pro tem was never a part of the duties of the office, and, in fact, the testimony revealed that at least one of the respondents never even sat as pro tem during the eleven-month period in which he served as public defender for the Judge. Thus the petitioner's manufactured federalism argument, asserting a state's right to have elected judges, has absolutely no relevance to this case. As stated in the Petition for Writ of Certiorari, at page 11, federal courts should be guided by how the state or county has defined the position. This is

precisely what the lower courts did here, focusing on Indiana Trial Rules regarding the position of judge pro tem, as well as on the operation of the public defender system in Lake County, Indiana. A-6.

Next, petitioner argues the position was "unique" because here the assistant public defenders made decisions about the operation of their office. However, the only "policy" discussed is that the respondents decided on their own which days they would work -- certainly not the type of determination which would be affected by political affiliation. Petitioner's contention that respondents made their own decisions regarding plea agreements, motions to file, etc. and thus lacked any written guidelines for their job was precisely the concern which motivated the Court in Branti to uphold the protected posture of this position. The Court in Branti stated that it would "undermine, rather than promote,

the effective performance of an Assistant Public Defender's Office to make his tenure dependent on his allegiance to the dominant political party." 445 U.S. at 518. The lack of guidelines simply reflects the necessary independence of the office. As this Court found in Branti, political loyalty to an employer is unrelated to the effective operation of the public defender system and in fact threatens the integrity of that system: "Whatever policy-making occurs in the Public Defender's Office must relate to the needs of individual clients and not to any partisan political interests." 445 U.S. at 519. In short, the allegations made by petitioner regarding the "unique" qualities of respondents' position are all factual questions which were decided

against the petitioner by the lower courts,[1] and are not an appropriate subject for a certiorari petition.[2]

II

THERE IS NO CONFLICT IN THE CIRCUITS REGARDING THE QUESTION OF PROTECTED POSITIONS UNDER BRANTI NOR IS THERE A NEED FOR FURTHER GUIDANCE FROM THIS COURT.

Petitioner's key argument for granting certiorari in this case is an alleged conflict between the Seventh and Eighth Circuits regarding which positions are

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[1]Petitioner also attempts for the first time in this litigation, to distinguish this case as involving part-time, rather than full-time employment. Respondents fail to see how this affects the constitutional right not to be penalized for political association. In any event, because this issue was never raised nor discussed by the courts below, it is not an appropriate question to be resolved at the first instance by this Court.

[2]As Justice Frankfurter noted, the Court should not grant certiorari "merely to review facts already canvassed by two and sometimes three courts." Wilkerson v. McCarthy, 336 U.S. 53 (1949) (concurring opinion).

protected under Branti. Citing the Tenth Circuit decision in Dickeson v. Quarberg, 844 F.2d 1435 (10th Cir. 1988), petitioner claims that whereas the Seventh Circuit focuses on the position in the abstract, the Eighth Circuit focuses on what the person in the particular position actually does. Petitioner has misstated the reasoning in Dickeson. The court did refer to a Seventh Circuit holding that a government employer should not lose his right to discharge an employee simply because that officeholder performs fewer or less important functions than usually attend the position. Tomczak v. City of Chicago, 765 F.2d 633, 641 (7th Cir.), cert denied, 474 U.S. 946 (1985). One cannot conclude from this, however, that the Seventh Circuit looks only at the position in the abstract. Indeed as the Dickeson court proceeds to note, subsequent Seventh Circuit decisions have sounded a "cautionary note" that each individual

office must be carefully examined as to job responsibilities. Dickeson, 844 F.2d at 1442, citing Meeks v. Grimes, 779 F.2d 417, 420-422 n.2 (7th Cir. 1985). The Tenth Circuit concludes, "We discern little difference between the Seventh Circuit test as qualified by Meeks and the Eighth Circuit test as articulated in Horton." Dickeson 844 F.2d at 1442. Petitioner's reliance on Dickeson to substantiate an alleged conflict in the circuits is faulty to say the least. He has taken one statement out of context, and has failed to mention the court's significant conclusion that there is "little difference" in the tests which have evolved.

In this case the lower court did in fact look to the responsibilities of the job in question and did not examine the position "in the abstract". The Seventh Circuit reasoned that if plaintiff's job in fact included the duty of serving as judge pro tempore, Judge Krajewski would have been

justified in applying political criteria: "We must ask what the powers of the actual office were..." A-6. The court then concluded that judicial service was clearly not a part of the duties of a public defender in Indiana. A-6. This was based on an examination of Indiana Statutes, as well as the testimony regarding operation of the court system in Lake County, and the uncontroverted testimony that one of the respondents never even served as pro tem.

Further, there is no reason to seek clarification from the Supreme Court on the question of which positions are protected from political patronage practices. The highly fact-sensitive nature of this issue makes the articulation of specific standards impossible. Branti provided significant guidance to the lower courts by stipulating that the relevant question was whether political affiliation would affect the way in which the office holder performed his

functions. This standard has clearly assisted the government and the courts by putting government on notice as to what it must prove in order to justify a politically motivated dismissal and by enabling the courts to focus immediately on the relationship between political beliefs and effective job performance without dealing with the vague labels of policymaker or non-policymaker. See Note, "Patronage Dismissals and the First Amendment" 25 ST. LOUIS UNIV. L.J. 189, 206-207 (1981).

Contrary to petitioner's assertion, the lower courts have developed a consistent body of criteria to assess whether political affiliation is an appropriate criterion for effective performance of a particular job. In Brown v. Trench, 787 F.2d 167, 169, (3rd Cir. 1986), relied upon by the petitioner, the court lists the relevant factors without any mention of a conflict in the circuits.

Indeed the Third Circuit proceeds to follow the Seventh Circuit holding that the key question is whether an employee has meaningful input into the decisionmaking process. 787 F.2d at 169-170. The First Circuit has recently commented on the considerable body of case law from the circuit courts of appeal:

> This seems a helpful corpus because of the variety of governmental positions considered, the additional inquiries made...and the overall coherence and consistency of these lower court decisions. Jimenez Fuentes v. Torres Gaztambide, 807 F.2d 236, 240-241 (1st Cir. 1986)

As the First Circuit notes, the question of protected positions does not lend itself to one single standard or criterion. Rather the lower courts have set up guidelines and, thus far, there do not appear to be any stark inconsistencies as to what those guidelines should be.

III

THE SUPREME COURT SHOULD NOT OVERRULE ITS EARLIER CASES PROTECTING POLITICAL AFFILIATION.

The Supreme Court should proceed with caution in deciding to overrule a previous decision, in this case one which is only twelve years old. This Court has noted that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). Petitioner argues that the effectiveness of government has not improved since Elrod was decided and therefore the decision should be overruled. General conclusory statements of this nature should certainly not provide the basis for overturning Supreme Court precedent. In Vasquez v. Hillery, 474 U.S. 254, 266 (1986), this Court noted that "detours from the straight path of stare decisis in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into

agreement with experience and with facts newly ascertained'." No such evidence has been introduced in this case.

In Elrod and Branti the Supreme Court cited the tremendous growth in public employment in the twentieth century and the need to provide some type of job security for government employees. The Branti standard protects the government's interest in insuring the political loyalty of those employees who implement partisan administrative policies and programs, and, at the same time, it protects government efficiency by insuring that competent experienced employees are not terminated simply because they are of the wrong political persuasion. Politically motivated terminations do not promote effective efficient government. This is no less true today than it was twelve years ago.

CONCLUSION

The Petition for Writ of Certiorari should be denied because (1) the Court of Appeals for the Seventh Circuit correctly applied the Branti standard regarding the protected position of public defender; (2) there is no conflict in the circuits as to the proper application of the Branti standard nor is there a need for further guidance from this Court; and (3) there is no reason for the Court to overrule its holding in Elrod.

Respectfully submitted,

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